IN THE

Supreme Court of the United States

October Term, 1946

No._____

SPOKANE PORTLAND CEMENT COMPANY, a corporation, and JOHN T. RAFTIS and CHARLES E. BENNETT, Executors of the Estate of W. N. BENNETT, deceased, *Petitioners*,

vs.

CHESTER W. SWANSON, GUY E. SWANSON, HAROLD M. SWANSON, DONALD C. SWANSON, GLENN G. SWANSON, MILDRED IRENE SODERBERG, ALICE M. SWANSON, as executrix of the estate of M. G. SWANSON, deceased, and ELLA PRICE, individually and as administratrix of the estate of HOWARD G. PRICE, deceased, *Respondents*.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT and BRIEF IN SUPPORT THEREOF

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PETITION FOR WRIT OF CERTIORARI

To the Honorable the Supreme Court of the United States:

Petitioners Spokane Portland Cement Company, a corporation, and John T. Raftis and Charles E. Bennet, executors of the Estate of W. N. Bennett, deceased, pray that this cause be certified to the Supreme Court for determination by it. The decision sought to be reviewed is reported in the transcript (R. 168) and, under the name of *Swanson et al.* v. *United States et al.*, in 156 F. 2d 442.

STATEMENT OF THE MATTER INVOLVED

The holders of a mortgage on 3,000 acres of land in the State of Washington instituted an action in the Superior Court of Stevens County, Washington, to foreclose the mortgage, resulting in a sheriff's sale for the full amount of the debt. (R. 67, 68).

About seven months after the sheriff's sale, the United States, upon application of the Reconstruction Finance Corporation, filed a petition in the District Court of the United States for the Eastern District of Washington, Northern Division, to condemn 340 acres (R. 32) of the property struck off at the sheriff's sale, to provide facilities for the production of magnesium and ferrosilicon, depositing in the registry of the court the sum of $10,736.50, estimated by Reconstruction Finance Corporation as just compensation for the property taken. (R. 3, 9).

The statutes of the State of Washington grant the judgment debtor and certain others, called redemptioners, one year after sheriff's sale within which to redeem. In the present instance, no redemption was made. (R. 69). The purchasers at the sale had assigned the sheriff's certificate to W. N. Bennett, and he had assigned it as to certain of the land, including part of the condemned portion, to petitioner Spokane Portland Cement Company. (R. 68). At the expiration of the statutory year, no redemption having occurred, the sheriff executed deeds to the executors of the estate of W. N. Bennett, then deceased, and Spo-

kane Portland Cement Company, petitioners herein, for the tracts embraced within their respective assignments. (R. 77.)

Afterward the jury in the condemnation suit fixed the just compensation for the land taken at $31,230.00 (R. 99, 105) and the United States paid into the registry of the court the difference between that amount and the sum of $10,736.50 previously paid, plus interest on the difference from the date of taking.

The District Court ordered the full amount of the award, except $35.00 awarded Julius Pohle and Janie E. Pohle for a small tract, paid to Spokane Portland Cement Company and the Bennett estate, grantees in the sheriff's deeds, and Richard C. Parnell and Thelma S. Parnell, to whose rights the Cement Company and the Bennett estate later succeeded. (R. 108-111; 141-146.)

On appeal, the mortgagors, though they had not redeemed, were decreed entitled to so much of the award as might remain after applying upon the mortgage debt, first, the value of the land not condemned, to be determined by evidence, and second, so much of the award as might be necessary to supply any deficiency. (Opinion, R. 168-187; Decree, R. 188.)

STATEMENT AS TO JURISDICTION

It is contended that the court has jurisdiction to review the decree in question under Sec. 240 (a) of

the Judicial Code, 28 U.S.C.A., Sec. 347. The date of the decree is June 26, 1946. (R. 189)

QUESTION PRESENTED

The question presented is whether judgment debtors who do not redeem from a mortgage foreclosure sale within the statutory year may claim any part of the sum awarded in a condemnation suit instituted after sale.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

The reasons for granting the writ are:

(a) The Circuit Court of Appeals has rendered a decision in conflict with the decision of the Circuit Court of Appeals for the Second Circuit, in *United States* v. *Lands in Hempstead, Nassau County, New York, et al.*, 129 F. 2d 918, where, after failure to redeem from a tax sale, it is said:

> "Since the award takes the place of the land, it is reasonable to require the owner to redeem in order to obtain the award, just as he would have to do to recover the land, had condemnation not intervened. If the rule were otherwise the inequitable result would be that the former owner could reserve his privilege to redeem until he learned whether the award would be greater or less than the sum required to exercise the privilege."

(b) The Circuit Court of Appeals has decided an important question of local law in a way in conflict

with applicable local decisions—in general, those decisions holding that the right of redemption is statutory and exclusive, and, in particular, those decisions holding that where land is taken in condemnation, after a mortgage foreclosure sale but before expiration of the statutory time for redemption, no redemption occurring, the recipient of the sheriff's deed is entitled to the award.

(c) The Circuit Court of Appeals has decided an important question of federal law which has not been, but should be, settled by the Supreme Court—the meaning, as applied to state foreclosures, of the last sentence of Section 1 of the Act of February 26, 1931, c. 307, 46 Stat. 1421, 40 U.S.C.A., Sec. 258a, granting the power to make such orders in respect of encumbrances, liens, rents, taxes, assessments, insurance and other charges, as shall be just and equitable.

Respectfully submitted,

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Counsel for Petitioners.

JOHN T. RAFTIS,
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HARRY T. DAVENPORT,
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Of Counsel for Petitioners.

I, Laurence R. Hamblen, of Spokane, Washington, counsel for petitioners, hereby certify that the foregoing petition is well founded and not interposed for delay.

LAURENCE R. HAMBLEN.

IN THE

Supreme Court of the United States

October Term, 1946

No.....

SPOKANE PORTLAND CEMENT COMPANY, a corporation, and JOHN T. RAFTIS and CHARLES E. BENNETT, Executors of the Estate of W. N. BENNETT, deceased, *Petitioners*,

vs.

CHESTER W. SWANSON, GUY E. SWANSON, HAROLD M. SWANSON, DONALD C. SWANSON, GLENN G. SWANSON, MILDRED IRENE SODERBERG, ALICE M. SWANSON, as executrix of the estate of M. G. SWANSON, deceased, and ELLA PRICE, individually and as administratrix of the estate of HOWARD G. PRICE, deceased, *Respondents*.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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OPINIONS DELIVERED IN THE COURTS BELOW

The opinion of the United States District Court for the Eastern District of Washington, Northern Division, Hon. Lewis B. Schwellenbach, District Judge, is reported under the name of *United States* v. *Bennett et al.*, at 57 F. Supp. 670; and the opinion of the United States Circuit Court of Appeals for the Ninth Circuit under the name of *Swanson et al.* v. *United States et al.*, at 156 Fed. 2d 442.

JURISDICTIONAL GROUNDS

The jurisdiction of the Supreme Court is invoked under Section 240 of the Judicial Code, 28 U.S.C.A. Sec. 347, upon the grounds, more fully stated in the foregoing petition, that

(a) The Circuit Court of Appeals has rendered a decision in conflict with the decision of the Circuit Court of Appeals for the Second Circuit;

(b) The Circuit Court of Appeals has decided an important question of local law in a way in conflict with applicable local decisions;

(c) The Circuit Court of Appeals has decided an important question of federal law which has not been, but should be, settled by the Supreme Court.

STATEMENT OF THE CASE

As more particularly stated in the petition, petitioners' predecessors foreclosed a mortgage on real estate, and purchased the mortgaged property at a judicial sale for the full amount of the mortgage debt. The state statute allowed the mortgagors one year after sale within which to redeem. They did not redeem. During the year, the United States condemned a portion of the land, depositing in the registry of the court the estimated just compensation. After the expiration of the year, the jury fixed the just compensation at a larger amount, and the United States deposited the balance. The District Court awarded the full sum to petitioners and their predecessors in interest. The Circuit Court of Appeals reversed, directing that the remaining, or non-condemned land, be appraised, that the appraised value thereof be credited upon the mortgage debt, that so much of the condemnation fund as might be necessary to make up the deficiency be applied upon the mortgage debt, and that the balance of the fund, if any, be paid to the mortgagors. The writ is directed against this determination.

SPECIFICATION OF ERROR

Petitioners assign as error the determination of the Circuit Court of Appeals that respondents, they not having redeemed, have an interest in the land purchased at the foreclosure sale, or in the fund de-

posited in the registry of the court on the subsequent condemnation of a portion of the land, which survived their failure to redeem.

SUMMARY OF ARGUMENT

1. In general, under the laws of Washington, the mortgagor's rights in the land cease unless he redeems within one year from the foreclosure sale.

2. Specifically, on the taking of land by condemnation during the redemption period the purchaser at the foreclosure sale is entitled to the award.

3. The last sentence of Section 1 of the Act of February 26, 1931, c. 307, 46 Stat. 1421, 40 U.S.C.A., Sec. 258a, empowering the court to make such orders in respect of encumbrances, liens, rents, taxes, assessments, insurance, and other charges, if any, as shall be just and equitable, does not empower it to award the condemnation money to a mortgagor whose obligation had been extinguished at a foreclosure sale prior to institution of the proceedings to condemn, and whose only remaining right is a right to redeem.

ARGUMENT

I.

Remington's Revised Statutes of Washington, 1932, provide for the foreclosure of mortgages on real estate as follows:

> Sec. 1116. "When default is made in the performance of any condition contained in a mort-

gage, the mortgagee or his assigns may proceed in the Superior Court of the county where the land, or some part thereof, lies, to foreclose the equity of redemption contained in the mortgage."

Sec. 1118. "In rendering judgment of foreclosure, the court shall order the mortgaged premises, or so much thereof as may be necessary, to be sold to satisfy the mortgage and costs of the action. The payment of the mortgage debt, with interest and costs, at any time before sale, shall satisfy the judgment."

Sec. 1121. "A decree of foreclosure of mortgage or other lien may be enforced by execution as an ordinary judgment or decree for the payment of money. The execution shall contain a description of the property described in the decree. The sheriff shall indorse upon the execution the time when he receives it, and he shall thereupon forthwith proceed to sell such property, or so much thereof as may be necessary to satisfy the judgment, interest and costs upon giving the notice prescribed in section 582."

Sec. 582 provides for notice of sale by posting and publication. Sec. 583 prescribes that the sale shall be by auction at the courthouse door. Sec. 590 provides for the sheriff's return and Sec. 591 for confirmation.

Sec. 595 provides: "The judgment debtor or his successor in interest, or any redemptioner, may redeem the property at any time within one year after the sale, on paying the amount of the bid, with interest thereon at the rate of eight per cent per annum to the time of redemption, together with the amount of any assessment or taxes which the purchaser or his successor in interest may have paid thereon after purchase, and like interest on such amount. . ."

> Sec. 603 provides as follows for the sheriff's deed: "In all cases where real estate has been, or may hereafter be sold in pursuance of law by virtue of an execution or other process, issued upon an ordinary money judgment, or by virtue of an execution or other process, issued upon a decree for the foreclosure of a mortgage or other lien it shall be the duty of the sheriff or other officer making such sale to execute and deliver to the purchaser, or other persons entitled to the same a deed of conveyance of the real estate so sold immediately after the time for redemption from such sale has expired: Provided, such sale has been duly confirmed by order of the court."

It was by this procedure that the mortgage in the present instance was foreclosed, there being no other method.

The right to redeem from the execution sale is a statutory right which must be exercised within the prescribed time. See *Schmidt* v. *Worley,* 134 Wash. 582, 236 Pac. 111; *In re Faber,* (D.C., W. D. Wash., N.D.) 11 F. Supp. 555, 558. If there might be circumstances in which the right of redemption would be extended, as is suggested in *Schmidt* v. *Worley,* just cited, it would seem indubitable that such extension could be obtained only by direct attack in the foreclosure court. Moreover, in the present case, respondents have not offered, and do not now offer, to redeem.

On general principle alone, under local law, the rights of respondents in the land, and in the avails of the land, ceased upon their failure to redeem from the execution sale within the year allowed by law for redemption.

II.

Moreover, as a particular rule, it is the settled law in Washington, that where land is taken by condemnation, after mortgage foreclosure sale and before the statutory time for redemption has expired, there being no subsequent redemption, the holder of the sheriff's certificate of sale at the time of taking is entitled to the award. *Commercial National Bank* v. *Johnson,* 16 Wash. 536, 48 Pac. 267; *Damon* v. *Ryan,* 74 Wash. 138, 132 Pac. 871; *In re Fourth Avenue South,* 18 Wn. (2d) 167, 138 P. (2d) 667.

These Washington decisions would seem to compel award of the condemnation fund to petitioners.

The theory of the Washington cases is supported by *United States* v. *Certain Lands in Town of Hempstead, Nassau County, N. Y. et al.,* (C.C.A.2) 129 F. 2d 918 where land had been sold for taxes prior to condemnation. To be distinguished is *Weber v. Wells et al.,* (C.C.A. 9) 154 F. 2d 1004 where the California tax sale was held to be "merely a book transaction to facilitate the adjustment of accounts between the tax collector and the auditor."

III.

The last sentence of Section 1 of the Act of February 26, 1931, c. 307, 46 Stat. 1421, 40 U.S.C.A., Sec. 258a, only provides "The court shall have power to make such orders in respect of encumbrances, liens,

rents, taxes, assessments, insurance and other charges, if any, as shall be just and equitable."

No right of either petitioners or respondents, we submit, came within any of these categories. The mortgage had been paid by the bid for the full amount. Respondents had no right but the right to redeem from the sale within one year.

Moreover, the result which would follow the decision under review, we urge with deference, is not just and equitable. It, in effect, would annul the foreclosure sale, and substitute for the public bid, on which petitioners' predecessors acquired the land, the speculations of expert witnesses.

The opinion of the Circuit Court of Appeals suggests, and the decision seems necessarily bottomed upon the suggestion, that the condemnation proceedings interfered with the process of redemption. (R. 185; *Swanson et al* v. *United States et al.,* 156 F. 2d 442, 450.) We urge the contrary. The award simply took the place of the land. Had respondents sought to redeem, the estimated just compensation would have been available in the registry of the court to apply upon the redemption, facilitating, not hindering, the exercise of the right of redemption. "Upon the application of the parties in interest, the court may order that the money deposited in the court, or any part thereof, be paid forthwith for or on account of the just compensation to be awarded in said proceeding." Act of February 26, 1931, c. 307, 46 Stat. 1421, 40 U.S.C.A., Sec. 258a.

Truly, during the running of the statutory year, it was not known whether, or in what amount, the jury would increase, or even decrease, the award. This uncertainty, however, did not place respondents in a peculiarly difficult quandary. One having the right to redeem, and weighing the advisability of exercising his right, may be obliged to consider a variety of factors—whether prices are going up or down, whether the railroad is coming his way, what the future of a particular industry may be. Respondents' problem was not different in principle from that of others pondering the question of redemption.

The power of the court to make such orders as might be just and equitable does not support the decree under review.

CONCLUSION

In Washington, a mortgagor's rights in land cease at the expiration of the year for redemption, if he do not redeem. So, also, his rights to an award in a suit for condemnation of the land, initiated after the sheriff's sale. The supervisory power of the court does not authorize it to disturb, by reason of the condemnation alone, the conditional finality of the foreclosure sale.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1946

No. 719

SPOKANE PORTLAND CEMENT COMPANY, a corporation, and JOHN T. RAFTIS and CHARLES E. BENNETT, Executors of the Estate of W. N. BENNETT, deceased, *Petitioners*,

vs.

CHESTER W. SWANSON, GUY E. SWANSON, HAROLD M. SWANSON, DONALD C. SWANSON, GLENN G. SWANSON, MILDRED IRENE SODERBERG, ALICE M. SWANSON, as executrix of the estate of M. G. SWANSON, deceased, and ELLA PRICE, individually and as administratrix of the estate of HOWARD G. PRICE, deceased, *Respondents*.

BRIEF OF RESPONDENT, ALICE M. SWANSON, AS EXECUTRIX OF THE ESTATE OF M. G. SWANSON, DECEASED, IN CONNECTION WITH THE PETITIONERS' PETITION FOR WRIT OF CERTIORARI, DIRECTED TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Petitioners' question presented (Pet. 6) is, we submit, too broad. It should be limited to situations where only part of the mortgaged land has been taken by condemnation, the question then being: Does the mortgagee get both the non-condemned land and all the award or the non-condemned land and the damage to its security?

OFFICIAL REPORT OF OPINIONS

The opinion of the United States District Court for the Eastern District of Washington, Northern Division, Hon. Lewis B. Schwellenbach, District Judge, is reported under the name of United States v. Bennett et al., at 57 F. Supp. 670; and the opinion of the United States Circuit Court of Appeals for the Ninth Circuit under the name of Swanson et al. v. United States et al., at 156 Fed. 2d 442.

STATEMENT OF THE CASE

Because petitioners' statement is sketchy we feel the necessity of briefly restating the essential facts.

In April, 1942 petitioners' predecessors, having foreclosed a mortgage on about 3000 acres of land in Washington belonging to respondents and their predecessors, bid the full amount of the foreclosure judgement, i.e. $36,586.33, at the sheriff's sale on foreclosure, which sale was duly confirmed, receiving sheriff's certificate therefore.

In November, 1942, during the year of redemption provided by Washington law, the United States of America condemned 340 acres of that tract, tendering into court $10,736.50 in payment therefor.

At the expiration of the year of redemption in April, 1943, no redemption having been made, petioners and their predecessors, as holders of such sheriff's certificate, surrendered the same to the sheriff and received sheriff's deed to the entire 3000 acres, including the 340 acres condemned, thus holding title to some 2660 acres.

Some time thereafter, on a trial as to value, a jury fixed the value of the condemned tract of 340 acres at $31,230.00, which sum with accrued interest is now over $34,000.00, is impounded in the District Court, and the sum over which this lawsuit is being waged.

In December, 1941 and during the pendency of said foreclosure proceeding, petitioners and their pre-

decessors obtained from M. G. Swanson and wife a quit claim deed to the lands in question, wherein Grace Bennett, wife of W. N. Bennett (now deceased but then living), was grantee, which deed remained in the possessoin of petitioners and was not disclaimed as a transfer of title until the trial of title in this action in August, 1944 (R. 70).

The trial court found "that redemption from such foreclosure by the Swansons was for practical purposes prevented by said condemnation proceedings" (R. 70), and the Circuit Court of Appeals made a similar finding (R. 117, 185).

The trial court directed the entire condemnation fund of $31,230.00 paid over to petitioners. This, the Circuit Court of Appeals reversed, holding that petitioners were limited to a lien upon the condemnation fund for the damage to their security by reason of the taking of a portion of the lands covered by the sheriff's certificate and for the determination of which damage the non-condemned land now owned by petitioners must be "evaluated" (R. 184). No evidence of damage to petioners' security was offered on the trial by petitioners (R. 100). In their statement of the matter involved, petitioners on page 5 of their petition indicate that the Circuit Court of Appeals opinion provided that the value of the non-condemned land is "to be determined by evidence." Such is not a correct statement for the Opinion (R. 187) makes no reference to evidence.

SUMMARY OF ARGUMENT

1. There is no conflict between the decision of the Circuit Court of Appeals for the Second Circuit in United States v. Lands in Hempstead, Nassau County, New York, 129 Fed. 2d 918, and the decision of the United States Circuit Court of Appeals for the Ninth Circuit in the case at bar.

2. Where, after foreclosure and before title vests in the purchaser at the mortgage sale, a portion of the mortgaged lands are taken in condemnation, the purchaser has a lien on the condemnation fund for the damage to his security by the taking.

3. The United States Circuit Court of Appeals for the Ninth Circuit, under its equitable powers expressly granted by statute, had power to make distribution of the award as it did.

ARGUMENT

I.

United States v. Lands in Hempstead, Nassau County, New York (C.C.A. 2), 129 Fed. 2d 918, involved foreclosure of a tax lien under the laws of New York followed by a tax sale, and a condemnation during the statutory period of redemption. It did not involve a mortgage. The condemnation was of the entire tax tract, not a part of it as here.

Weber v. Wells (C.C.A. 9), 154 Fed. 2d 1004, which petitioners attempt to distinguish, is a case

which on its facts is similar to the Hempstead case. The reference therein to a "book transaction" does not in the least affect the matter in hand as suggested by petitioners (Pet. 17). It involved, of course, California tax laws. In it, the Ninth Circuit expressly refused to follow the Hempstead case as affecting the tax foreclosure laws of California holding that all the tax title holder could get was the damage to his security.

This court, in Ruhlin v. New York Life Ins. Co., 304 U. S. 202, has held that as to questions controlled by state law a conflict among circuits is not of itself a reason for granting certiorari.

The rights of petitioners are to be determined as of the date of the taking in condemnation, Danforth v. United States, 308 U. S. 271-283. At that time the petitioners had only a lien. Atwood v. McGrath, 137 Wash. 400, 242 Pac. 648. Their rights are to be determined by state law, 40 U.S.C.A. No. 258 *a*, 46 Stat. 1421; Abraham v. Casey, 179 U. S. 210.

Incidentally, the court in the Hempstead case did not refer to the exception in New York, viz. that where after mortgage sale part of the land is condemned, the mortgagee can only participate in the award to the extent of his deficiency or damage to his security. In re Bowry Savings Bank, 284 N.Y.S. 232; Utter v. Richmond (N. Y.), 20 N.E. 554.

II.

Where a mortgagee has foreclosed and condemnation follows, he has a lien for his deficiency if one exists, or for the damage to his security. Since petitioners bid the full amount on the foreclosure sale they had no deficiency, so their lien against the award could only be for the damage to their security, which is arrived at by crediting the bid with the value of the non-condemned property. Though the burden was on them, petitioners offered no proof of such damage. Gray v. Davison, 78 Wash. 482-487, 139 Pac. 219; Commercial Bank v. Johnson, 16 Wash. 536, 48 Pac. 267. And such is in accord with equitable principles. Calumet River R. Co. v. Brown (Ill.), 26 N.E. 501, 12 L.R.A. 84; In re Bowery Savings Bank, supra; John Hancock Mutual Life Ins. Co. v. Casey (C.C.A. 2), 147 Fed. 2d 762-766; Fidelity Philadelphia Trust Co. v. Kraus (Pa.), 190 Atl. 874, 110 A.L.R. 538.

III.

The statute, Section 1, of the Act of February 26, 1931, c. 307, 46 Stat. 1421, 40 U.S.C.A. No. 258 *a*, clothes the Court with power to make such orders in respect to encumbrances, liens ***** as shall be just and equitable. The state law does not control the manner of distribution. John Hancock Mutual Life Ins. Co. v. Casey supra; U. S. v. Certain Lands in Brooklyn, 129 Fed. 2d 577-579.

Both the trial Court and the appellate Court found that the condemnation prevented a redemption (R. 70, 177, 185). A bar to redemption was a deed taken for petitioners from the Swansons while foreclosure was pending (R. 70). This deed was held by petitioners until long after the year of redemption had expired, when, on the trial of title, they disclaimed it. Obviously, any attempt by the Swansons to redeem would have met with the resistance of this deed, which seems to have been obtained and held to use as the wind might blow.

Petitioners' bid at sheriff's sale of $36,586.33 fixed the value of the 3000 acres. Petitioners suggest it is equitable they have 89% of land and also have all the $32,100.00 award. All this, for a mortgage for which they paid but $500.00 (R. 72).

Petitioners suggest that respondents could have taken down the condemnation tender of $10,736.50 and used it in redeeming. Such suggestion overlooks two facts— one, that the quit claim deed above referred to would undoubtedly prevent the exercise of redemption as suggested; and, two, it would mean a loss of over $20,000.00 to the Swansons considering the jury's later fixing of value; and, after all, the Swansons were impoverished and had no other

means of redemption (R. 69). Quite different were the facts in the Hempstead case. There, the condemnation fund exceeded the amount necessary to redeem.

Respectfully submitted,

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